IN THE

Supreme Court of the United States,

No. ~~472~~ 57, December Term, 1870.

David C. Houston et al., Plaintiffs in Error and Plaintiffs below,

vs.

The Trustees of Jefferson College, at Canonsburgh, in Washington County, in the Commonwealth of Pennsylvania, and the Washington and Jefferson College, Defendants in Error and Defendants below.

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PRINTED BY BAKEWELL & MARTHENS, PITTSBURGH.

In the Supreme Court of the United States,

DECEMBER TERM, 1870.

DAVID C HOUSTON, JOHN JOHNSON AND ONE HUNDRED AND TWELVE OTHERS,
Plaintiffs below and Plaintiffs in error,
vs.
THE TRUSTEES OF JEFFERSON COLLEGE, IN CANONSBURGH, IN THE COUNTY OF WASHINGTON, AND WASHINGTON AND JEFFERSON COLLEGE.

No. ~~472~~ 57

In error to the Supreme Court of Pennsylvania.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

This cause, with the two next preceding causes (Nos. 470 and 471), comes up on a writ of error to the Supreme Court of Pennsylvania, to review the decree of that Court sustaining the validity of two Acts of Assembly of that State, which, the Plaintiffs claim, are repugnant to the 1st division of section X of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of contracts.

The Record brought up shows the following case:

The plaintiffs, originally six, (with whom afterwards one hundred and eight others asked to become, and were admitted, co-plaintiffs—printed Record, pp. 25–28,)—holders of scholarship certificates, issued by the Trustees of Jefferson College, in 1853, filed this bill in equity, in the Supreme Court of Pennsylvania, on the 24th August, 1869, against the two Corporations, defendants, wherein they set forth :—(Printed Record, pp. 1, 2, 3, 4.)

1. That Jefferson College was incorporated under the name of "The Trustees of Jefferson College, in Canonsburgh, in the county of Washington," by an Act of Assembly of Pennsylvania, approved January 15th, 1802, entitled "An Act for the Establishment of a College at Canonsburgh, in the county of Washington, in the Commonwealth of Pennsylvania,"—as per copy appended—(Record, pp. 4–7.)

2. That said College, organized under said act, had, from time to time, received donations from the State and individuals; has a valuable library, astronomical and chemical apparatus, and several buildings fitted for a College, in the village of Canonsburgh, and, from its incorporation until the grievances hereinafter complained of, has uninterruptedly prospered.

3. That in 1853, the Trustees of said College devised and put in operation a plan of endowment, evidenced by certificates of scholarship, issued by the Trustees, under the corporate seal, &c.; whereby tuition, &c., in said College, was granted to the holders, they paying into the Corporate Treasury therefor various sums of money, according to the grade or quantity of the scholarship, ($25 for a single scholarship, or course of tuition; $50 for a family; $100 for one of thirty years; $400 for a perpetual, and $1,250 for a perpetual, with board and room rent, &c.;) that some 1,500 of these certificates were issued, of which some 1,200 were yet outstanding. (Copies of plan and certificate appended—Record, pp. 13 and 14.)

4. That plaintiffs, residents of Canonsburgh and its vicinity, relying upon the good faith of said Trustees, and the perpetuity of said College at Canonsburgh, bought and still hold such certificates of scholarships, believing that thereby they could have their sons or descendants educated at said College, in Canonsburgh, without the expense and risk of sending them from home.

5. That on March 4th, 1865, the Legislature of Pennsylvania passed an act, entitled "An Act to unite the Colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one Corporation, under the name of Washington and Jefferson College;" whereby Jefferson College was to unite with another College, called Washington, and form Washington and Jefferson College, which was to have all the property of said Jefferson College; and that thereafter the studies of the Senior, Junior and Sophomore classes should be pursued at Canonsburgh, and those of the Freshmen class, and of the Preparatory, Scientific, and Agricultural and Art departments, at Washington. (Copy of said act appended—Record, pp. 7–12.)

6. That on the 26th of February, 1860, the said Legislature passed another act, entitled "A Supplement" to the Act of 1865 aforesaid, whereby it was enacted that the future location of said Washington and Jefferson College should be either at Canonsburgh, Washington, or elsewhere in Pennsylvania, as two-thirds of the Trustees thereof might determine, or, if they could not agree, then as four out of five of a commission of gentlemen, chosen by the Trustees, should recommend. (Copy of said act appended—Record, pp. 12, 13.)

7. That plaintiffs are informed and believe that the Trustees of Jefferson College, in Canonsburgh, &c., claim to have accepted said Act of 1865, and to have joined in uniting said two Colleges, and have removed the Freshmen class, and the Preparatory and Scientific departments from Canonsburgh to Washington, seven miles distant.

8. That plaintiffs are also informed and believe, that the Trustees of the College called "Washington and Jefferson College," formed under said Act of 1865, are about to remove the College library, apparatus, classes and professors from Canonsburgh to Washington, and to dispose of the College buildings, &c., at Canonburgh, so as to deprive the plaintiffs of the tuition, &c., agreed to be there given to them; and that defendants justify said proposed action, under said Act of 1869.

9. That said scholarship certificates constitute subsisting contracts between plaintiffs and said Trustees of Jefferson College, in Canonsburgh, &c., entitling them to have the granted tuition, &c., at that place, in the College there; and that if said Acts of 1865 and 1869 are to have effect, they will be irreparably injured, and the said contracts impaired.

10. That said Acts of 1865 and 1869 are invalid and unconstitutional, because impairing the obligations of subsisting contracts; and therefore are repugnant to section 17 of Article IX of the Constitution of Pennnsylvania, and division I of section X of the Constitution of the United States.

The *Prayer* of the bill is—

1. That said Acts of 1865 and 1869 be declared null and void, as repugnant to the aforesaid constitutional prohibitions, in that they undertake to change, or authorize defendants to change, the location of said College, its classes or any of them, or its buildings and property, from Canonsburgh to Washington, or elsewhere.

2. That defendants and every of them be enjoined from making such change or removal.

3. Other and further relief, &c.

ABSTRACT OF ACTS OF ASSEMBLY,

Appended to and made part of Bill.

ACT OF JANUARY 15, 1802, (Record, p. 4.)

Its *title* is "An Act for the establishment of a College *at Canonsburgh*, in the county of Washington, in the Commonwealth of Pennsylvania."

Its *preamble* is "Whereas, the establishment of a College *at Canonsburgh*, in the county of Washington, for the instruction of youth in the learned languages, in the arts and sciences, and in useful literature, would tend to diffuse information and *promote the public good.*"

Sect. 1. "That there be erected and hereby is erected and *established in Canonsburgh*, in the county of Washington, a College, &c., under the management, direction and government of a number of trustees, not exceeding twenty-one, &c.

Sect. 2. "Said trustees and their successors shall *forever hereafter be* one body politic and corporate, with *perpetual succession* in deed and in law, to all intents and purposes whatever, by the name, style and title of "The Trustees of Jefferson College *in Canonsburgh*, in the county of Washington." They are given the usual corporate powers—to take and hold lands, moneys, &c., to sue and defend in courts, &c., with all other powers, &c., usual in other Colleges in the United States.

Sect. 3, provides for meetings of the trustees "at the town of Canonsburgh," for making by-laws and ordinances for the government of the College, appointing principal and professors, &c., and careing for the corporate property.

Sect. 4, provides for the College faculty and its powers.

Sect. 5, provides for the succession in the trustees, how misnomers in gifts or grants by deeds, or in devises or bequests, shall be treated; adding,

"And the constitution of the said College herein and hereby declared and established, shall be and remain the inviolable constitution of the said College forever, and the same shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an Act of the Legislature of this Commonwealth."

Sections 6, 7 and 8 are unimportant here.

ACT OF MARCH 4, 1865. (Record, p. 7.)

Its *title* is "An Act to unite the Colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one corporation, under the name of Washington and Jefferson College."

Its *preamble* recites that "the trustees of those Colleges (Jefferson and Washington) *have agreed upon a union* thereof, and have besought this General Assembly to *give thereto* the sanction and aid of a legislative enactment."

Sect. 1, unites said two Colleges into one corporation by the name aforesaid.

Sect. 2, vests all the property and funds of each in the new corporation, "and all the several liabilities of said two Colleges or corporations, by either of them suffered or created, including the scholarships heretofore granted by, and now obligatory upon each of them, are hereby imposed upon and declared to be assumed by the corporation hereby created, which shall discharge and perform the same without diminution or abatement."

Sect. 3, declares the objects of the corporation.

Sections 4 to 9, provide for how the trustees are to be selected and continued, and prescribes their powers and duties.

Sect. 10, directs that there shall be four periods or classes of study, of a year each, denominated the Freshman, Sophomore, Junior and Senior classes.

Sect. 11, creates two additional departments of study, the Scientific and Preparatory; the first to qualify students for business avocations, the second for admission to the first, or to the Freshman class of the College.

Sect. 12, provides prospectively for an agricultural department.

Sect. 13, declares "that the studies of the Senior, Junior and Sophomore classes shall be pursued at or near Canonsburgh, in the county of Washington, and those of the Freshman class and of the Preparatory, Scientific and Agricultural departments at or near Washington, in said county," and provides for how the income of endowment funds shall be apportioned, &c.

Sect. 14, commits the instruction and government of the three higher classes named, to the President and Professors of those classes, and the instruction and gov ernment of the Freshman class and the departments, to the Vice President and Professors, or instructors of their appropriate studies, &c.

Sections 15, 16 and 17 are unimportant here.

Sect. 18. "That from and after the organization of the corporation hereby created, as herein provided, the Colleges of Jefferson and Washington, named in the first section of the act, shall be dissolved, except so far as may be found necessary to enable them to close up their business affairs and to perfect the transfer of their property and rights to the corporation by this act created."

ACT OF FEBUARY 26, 1869. (Record, p. 12.)

It is entitled "*a supplement*" to the Act of March 4, 1865.

Sect. 1. "That as soon as the necessary preliminary arrangements can be made and suitable buildings pro-

vided, the *several departments* of Washington and Jefferson College shall be closely united, and located either at Canonsburgh, Washington, or some other suitable place within this Commonwealth, to be selected and fixed in the manner hereinafter specified."

Sect. 2. "The location of the College shall be determined by the Board of Trustees by a vote of not less than two-thirds, &c., if they can agree, and if they cannot agree within sixty days after the passage of this act, the question of location shall be referred to a commission of five gentlemen." Then, after prescribing the mode of procedure, it directs that they "shall report to the Board of Trustees in writing, where, in their judgment, the united College shall be located, and thereupon the Board of Trustees shall proceed, with as little delay as possible, to carry into effect their recommendation."

Sect. 3. "The commission, if resorted to, shall be chosen by the Board of Trustees," by a two-thirds vote, &c.

Sect. 4 is unimportant.

Sect. 5, provides for an "academy, normal school or other institution of lower grade than a college," to be given by the trustees to the unsuccessful one of the two places named, or to both, if the College is taken elsewhere, with some real or personal property of the College for the use of such academy, &c.

Sect. 6. "It shall be lawful for any incorporated college or institution of learning within this Commonwealth to unite with Washington and Jefferson College, and consolidate their property and funds for educational purposes, on such terms and conditions as may be agreed upon."

The bill was duly served upon both defendants. The first-named put in no appearance or answer. The other defendant, "Washington and Jefferson College," appeared and put in an ANSWER — (Record, pp 15–25, of which the following is an abstract:

Said defendants—Washington and Jefferson College—admit the allegations in the 1st section of the bill; also, those of the 2d and 3d sections with qualifications, as hereinafter stated. They also admit that plaintiffs are residents and holders of scholarships, as alleged in the 4th section of the bill, but decline any admissions as to the alleged motives or inducements to buy the scholarships. They admit also the Acts of Assembly of 1865 and 1869, as appended to the bill, and assert that under the latter Act, the location of the College has been fixed at Washington, by a two-thirds vote of the Trustees of Washington and Jefferson College. They admit that in March, 1865, the Trustees of the two Colleges, named in the Act of 1895, accepted said act and effected the union of said Colleges, as directed by said act.

The Answer then asserts that the Trustees of Washington and Jefferson College, on June 9th, 1869, "*resolved to bring together at Washington all the College classes*," and that then, and "at their subsequent meeting on August 4th, 1869, they made appropriate and complete arrangements for the organization and conduct of said Institution, and the instruction and discipline of *all the College classes at Washington*, and that they *made no provision whatever* for the conduct of any department of the said College at Canonsburgh thereafter. They deny having yet removed any of the College property from Canonsburgh, or disposed of any of the several College buildings there; but say that they "*intend* to dispose of and devote the same in strict conformity with the Act of 1869, whenever they may lawfully do so."

They then assert their good intentions to give to the plaintiffs, and all other holders of scholarships, the tuition to which they are entitled, *at Washington*.

They deny the "argumentative inferences" in the

9th section of the bill, and deny that said Acts of Assembly of 1865 and 1869 are invalid and unconstitutional, for the reasons alleged, or "for any other reason."

"Further answering"—(Record, pp. 16–24,)—the said defendants go into a history of the two old Colleges, and of the efforts and proceedings which resulted in the union of 1865; asserting, *inter alia*, that "*the two Boards* besought the General Assembly for the passage of the Act of March 4, 1865," but that the Act of 1869 was procured to be enacted only by the Trustees of "Washington and Jefferson College."

It is no where asserted that any of the holders of scholarships—plaintiffs or others—had any agency whatever in promoting the union, or that they knew of, or accepted tuition under it; or that any of them had any agency in procuring the Acts of 1865 or of 1869.

The Answer further shows—(Record, pp. 17 and 23)—that the draft of the Act of 1869, almost in *hæc verba*, was prepared and first adopted by the Trustees of Washington and Jefferson College, who sent a committee to the Legislature to "procure" its passage.

The cause was set for hearing, on Bill and Answer, at the November Term, 1869, of the Supreme Court of Pennsylvania, and was heard, in connection with the two other cases now in *this* Court—(Nos. 470–471)—the decrees dismissing the bills being pronounced in January, 1870; whereto the writs of error in this and the other two cases were sued.

The *Opinion* and *Decrees* of the Court below, were by the Chief Justice (Thompson,) and are found on pp. 28 and 33 of the printed Record in *this* case.

The *Error* assigned and complained of here is to the decree dismissing plaintiffs' bill and denying its prayer; thereby, as plaintiffs claim, sustaining the Act of 1865, which removed in small part, and the Act of 1869, which authorized the *entire* removal of the College classes, departments, professors, property and funds from Canonsburgh; in vital impairment of the scholarship, contracts for tuition, &c., in the College there, which the Trustees of Jefferson College had granted to plaintiffs and others for moneys paid.

(168) Dec. 1871

	II	III
Tompkins		Thornton
The U. S.		Heirs of Vigil
do		Clyde
Cumpelly	-	Green Bay & Miss. Canal Co.
Twibilcock		Wilson & Wilson
The U. S.	-	Huger & Lowndes
Webb Trustee	-	Sharp
Carlton		Bokee
Dooley		Smith
A. of Bath		Army
The U. S.	-	Kimball & Barnes
do		Marble
Jeff.	v	Wash & Jeff. Coll.
Post		Martin
French		Edwards
Nicholson	-	Jenkins
A. of Pendleton	-	Army
Ward		The U. S.

II

Myers & Croft
Black Crow

ASSIGNMENTS OF ERROR.

1st. The Court below erred in refusing to decree as prayed for in the first prayer for relief contained in complainants' bill, which was in the following words:

"That the said several Acts of Assembly, approved respectively the 4th day of March, 1865, and the 26th day of February, 1869, be declared null and void, as repugnant to the 17th section of the 9th article of the Constitution of the State of Pennsylvania, and the first division of the 10th section of the Constitution of the United States, in so far as they undertake to change the location of said college, its classes, or any of them, and buildings and property, from Canonsburgh to Washington or elsewhere."

2d. The Court below erred in refusing to decree as prayed for in the complainants' 2d prayer for relief, which was as follows:

"That now by a preliminary, and hereafter by a perpetual injunction, the defendants, and each and all of them, be enjoined and restrained from removing the said college, or any or all of the classes or departments thereof, or the books, apparatus, and property thereof, from Canonsburgh to Washington or elsewhere."

3d. The Court below erred in dismissing complainants' bill.

4th. The Court below erred in holding that the obligation of the contract held by the complainants was not impaired by the Acts of Assembly, dated respectively the 4th day of March, 1865, and the 25th day of February, 1869, and in refusing to grant an injunction against the enforcement of the said Acts, as being null and void, because repugnant to the first division of the 1st section of the Constitution of the United States.

BRIEF OF ARGUMENT AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

That the plaintiffs are holders of valid contracts, purchased by them, for a valuable consideration, from the trustees of Jefferson College, is not denied. But it is claimed, 1st, that the legislation complained of did not, in point of fact, infringe said contracts; 2d, that, even if said contracts were set aside or affected by such legislation, yet their obligation cannot be said to be impaired, in a legal sense, because the acceptance of the obnoxious legislation by the trustees of Jefferson College concluded the plaintiffs; and 3d, that, at all events, the Acts of Assembly in question were passed by the Legislature of Pennsylvania in the exercise of a power so to do reserved in the original charter of Jefferson College.

These three propositions we propose to consider briefly in the order above indicated.

And, first, why are our contracts of scholarship not infringed or impaired by these Acts of Assembly? We are pointed to that provision, contained in the second section of the Act of Assembly of 1865, whereby it is declared that all the several liabilities of the two original colleges, including their scholarships, shall be obligatory upon the new corporation, which should discharge and perform the same without diminution or abatement. "The whole and entire of these contracts are thus," says the Court below, "saved in their identity and integrity."

In reply we say, that the right to receive tuition from Washington and Jefferson College at the town of Washington, or wherever else the board of trustees may choose hereafter to locate their college, is not equivalent to the right to receive tuition from time-honored Jeffer-

son College "at Canonsburgh, in the county of Washington, in the Commonwealth of Pennsylvania." A comparison of the charter of Jefferson College with that conferred upon the new college by the Acts of 1865 and 1869, will disclose many particulars of difference. We do not now propose to specify them in detail, but select for observation the particular of infringement which most aggrieves the plaintiffs, and which received special notice in the Court below. We refer to the change of location of the college. We contend, that by the express terms of the scholarships, Canonsburg, in the county of Washington, is recognized as the place of performance. "This certifies that ———————— has paid ——— dollars, which entitles him to the privilege of at————scholarship, as specified in the plan of endowment adopted by the trustees of *Jefferson College in Canonsburgh, in the county of Washington, &c.*" Even if we are wrong in this, it is plain that, by clear and necessary implication, the place of performance of contracts like college scholarships, is an essential and vital part of the contract. The *title* of the original Act is, "An Act for the establishment of a college at Canonsburgh, in the county of Washington, in the Commonwealth of Pennsylvania." The *preamble* recites that "the establishment of a college at Canonsburgh, in the county of Washington, would promote the public good." "The trustees and their successors *shall forever hereafter be one body politic and corporate, with perpetual succession* n deed and in law, to all intents and purposes whatever, by the name, style and title of 'The Trustees of Jefferson College, in Canonsburgh, in the county of Washington.'" Pursuant to this charter an institution had been established and had flourished for a period of half a century, when the trustees devised a plan of endowment, and induced the plaintiffs to become contributors thereto by the purchase of scholarships.

What did the parties intend at the time the contracts were made? Would not the subscribers to the plan of endowment say, "We expect to get our tuition from Jefferson College, located at Canonsburgh; *permanently* located." A college is not a perambulating institution —it is a fixed one.

It is immaterial whether the place of performance, in the present instance, be regarded as an *express*, or as an *implied* part of the contract. Both express and implied contracts are within the protection of the Constitution.

Says Story, in his Commentaries on the Constitution, sec. 1, 371, "Contracts are express or implied. Express contracts are where the terms of the agreement are openly avowed and uttered at the time of making it. Inplied contracts are such as reason and justice dictate from the nature of the transaction, and which the law therefore presumes that every man undertakes to perform. The Constitution makes no distinction between the one class of contracts and the other. It then equally embraces and applies to both. Indeed, as by far the largest class of contracts in civil society, in the ordinary transaction of life, are implied, there would be very little object in securing the inviolability of express contracts, if those which are implied might be impaired by State legislation. The Constitution is not chargeable with such folly or inconsistency."

We say unhesitatingly, that all parties contemplated a *permanent* location at Canonsburgh. Some fifteen hundred of these scholarships were sold, and of these several hundred were bought and are held by residents of Canonsburgh. It is, however, apparent that every holder of a certificate has the same right as the complainants to insist that the contract shall be carried out according to its terms, *without reference to his own residence.* He has a right to require the free tuition of one scholar in Jefferson College in Canonsburgh, in the county of Washington.

A citizen of Wheeling, or of Cincinnati, would not be *so likely* to insist upon the performance of this contract at the *place* agreed upon, as a citizen of Canonsburgh, but he has the same rights, and, for aught the Court can know, may feel the same interest. He may have bought the scholarship to benefit a friend or relative at Canonsburgh, or to improve his property there; or he may desire to remove there to educate his children, and may prefer to go to Canonsburgh to going to Washington or elsewhere. It may be fairly assumed that all the holders of the outstanding scholarships, some twelve hundred in number, join with the complainants in desiring the relief prayed for—at least that they *may desire* such relief, whether they do in fact or not. But it is immaterial to the rights of the nominal complainants whether the number of those concurring with them is 50, 100, or 1,200. The rights of one are exactly the same as the rights of all.

These contracts give to each holder the right to have one scholar attending Jefferson College at Canonsburgh, free from tuition charges. That was the *College*, and that was the *place*, where the scholar was to be educated; the *place* is as much a part of the contract as the designation of the College. The substance of the contract is tuition to be afforded in Jefferson College in Canonsburgh.

If it were possible to add strength to this position, that addition would be found in the circumstances in which the College was placed at the time of the contract, with all of which the parties must be presumed to have been acquainted. 1. The charter of the College—Jefferson College, in Canonsburgh—was perpetual. 2. It was authorized to establish and maintain a College at Canonsburg, and *not elsewhere*. 3. It had been actually established at Canonsburgh for more than fifty years.

We say, therefore, that these scholarships expressly bind the corporation to maintain the College at Canonsburgh; and that this interpretation is strongly confirmed

by the circumstances which surrounded the parties when the contracts were entered into.

We are able to cite a case directly in point. That is the case of *Daily and others vs. The Genesee College*, in the Supreme Court of the State of New York. The facts of the case were, that Genesee College was incorporated in 1849, was located and buildings erected in the town of Lima, in Livingston county, N. Y.; that scholarships were issued by the institution, and subscribed and paid for by the plaintiffs; that subsequently, under an offer of $200,000 from the Conference of the Methodist Church at Syracuse, N. Y., the trustees of the College resolved to abandon Lima and remove the College to Syracuse, and applied for an Act of Assembly to authorize the removal. At that juncture a bill was filed by some of the scholarship holders, on behalf of themselves and of such others as should desire to be made parties and an injunction asked for and obtained, restraining the defendants from the removal of the College. The ground upon which the injunction was put, was, that in the case of a scholarship issued by a College having an established location, the *place where the tuition is to be given is an essential part of the contract.* Says Judge Johnson, in his opinion granting the injunction, "It is plain that neither party had any other place in contemplation, and that must, of necessity, have been the place agreed upon, as definitely and certainly as though it had been specified in the most exact and unequivocal terms in the certificate. The place of performance, in this as in all other contracts, is a material part of such contract, *and the obligation can neither be satisfied nor discharged by tender of performance at another place.* The party who has the promise of another, for the performance on his part, at a particular place, has the right to insist upon such performance at such place, and cannot be required to accept of a performance at any other.

"In view of the nature of the services to be rendered by the College, and the continuing character of the obligation, the place of performance was of the utmost consequence to those plaintiffs who are inhabitants of Lima. An offer by the College to perform its undertaking at Syracuse. could neither justify nor excuse a failure to perform at Lima.

"And the damages which the plaintiffs would sustain by reason of such a breach, in view of the nature of the duty or obligation to be performed, would be most difficult, if not absolutely impossible to recover and compensate in damages.

"It seems to me just the case where equity will step in to prevent the commission of such an intended wrong, because the undertaking is of such a nature that the injury arising from non performance cannot be adequately compensated in damages. In such cases equity will not look at the advantage which the wrong-doer would gain by his contemplated breach, or take it into consideration. It only looks to the just and equitable security and protection of the rights which the other party had secured to him by the contract, where that is neither unjust nor unconscionable, as is the case here. It is a mode of enforcement of the obligation of the contract, by preventing the breach of it, which lies peculiarly within the province of equity."

The removal of the College to Washington or elsewhere, would constitute a palpable breach of these twelve hundred contracts.

The opinions of each of the Judges who decided the celebrated Dartmouth College case, show what their views upon this question would have been. The question of *locality* was not involved in that case, but the reasoning of the Judges is as applicable to the *locality* as to any other quality of the charter.

The reasoning of the Court below, on this branch of

the case, is, we suggest, narrow and inconclusive. The learned Chief Justice, in his opinion, compares our case to those wherein stay laws have been held constitutional, as affecting only the remedy. We fail to perceive the analogy suggested. The necessary implications of a contract are as much part of it as the express terms, and are equally to be protected from legislative infringement. Suppose the trustees of Jefferson College, without having procured any legislative authority, had refused to furnish tuition to the scholarship holders at Canonsburgh, but had tendered performance elsewhere, would not such conduct have been a breach of their contract? If so, is not the same conduct, when done under guise of legislative authority, equally a breach of contract, if so be that the Legislature have no valid power to authorize such a departure from the substantial reasoning of the contract?

We now proceed to the second division of our subject. This arises out of the position contended for by the defendants in error, and sustained below, that even if the legislation referred to does, in point of fact, overturn or impair the contracts of scholarship, yet the holders of such contracts cannot be heard to complain because concluded by the act of the trustees of Jefferson College in accepting the Act of 1865. This position is put upon the supposed general right of a private corporation to surrender its franchises, and the case of *Mumma vs. The Potomac Company*, 8 Peters, 381, is relied on as sustaining the doctrine.

The parties to the contract in question are the trustees of Jefferson College, the grantors, and the subscribers to the plan of endowment, the grantees named in the several scholarships. Now it must be a strange state of the law, if one of said parties, the trustees, can, by a voluntary dissolution, escape from the obligations of their contracts. We are not speaking of dissolution caused

by an abandonment of their function, because we suppose it will be conceded by even the defendants in error that, in such a case, successors could and would be appointed to fulfil the duties of the recreant trustees. Nor are we speaking of such a case of dissolution as might occur if proceedings were instituted and carried through to forfeit corporate franchises for acts of abuse. But the case in hand is that of an attempted dissolution by procuring and accepting an Act of Assembly dissolving the corporation.

In the case of *Van Hoffman vs. The City of Quincy*, 4th Wallace, 235, it was held, that when a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid for such bonds, the power of taxation thus given is a contract within the meaning of the Constitution, and cannot be withdrawn until the contract is satisfied; that the State and the corporation, in such a case, are equally bound; that the power thus given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and *that neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.*"

But even if the general rule be as claimed, namely, that a private corporation can, by procuring and accepting an Act authorizing this dissolution, evade the obligation of their contracts held by third persons, yet such rule cannot be successfully invoked by the defendants in the present case, because the Board of Trustees of Jefferson College were not possessed of the power to accept the legislation relied upon. Being merely trustees, and not owners of the college fund, their powers extend to its preservation and proper application, and not to consent to its withdrawal from the existing beneficiaries.

The case of the *State ex rel Pittman vs. Adams et al.*, Missouri Reports, vol. 44, page 570, is directly in point. By the charter of "St. Charles College" it was required to be "an institution purely literary, affording instruction in ancient and modern languages, the sciences and liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive to reasonable or liberal-minded persons, whatever may be their religious opinions." An amendment of the charter approved February 6th, 1847, provided that "the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church South," should be requisite in filling all vacancies in the board. It was held, that the amendment, by requiring the concurrence in the choice of curators, of an ecclesiastical body representing one of the religious denominations of the State, endangered, in this regard, the principles of the foundation; and, even if it did not, it changed the character of the administration of the trust, hindered the free choice of their successors, according to the will of the founder, by the men to whom he had entrusted his bounty, and essentially impaired the contract upon which he advanced it. *Held*, further, that the curators, or trustees, of an eleemosynary institution have no power over the charter, but on the contrary it is their creator and their absolute rule of conduct; that the beneficial interest in the college fund belongs neither to them nor the State, but to the beneficiaries only, who, from the nature of the case, cannot consent to any changes in the charter; *that, hence, its essential conditions are permanent, so far as change depends upon consent, and the acceptance of a legislative amendment to the charter of such an institution by the board of curators gives it no validity.*

The doctrine that the managing board cannot validate

any improper legislative change, if not expressly decided, is clearly recognized in the case of *Allen vs. McKeen*, 1 Sumner, 300. "But what," says Judge Story, "is the nature and extent of this visitorial power? Is it the power to revoke the gift, or change its uses? to divert the rights of the parties entitled to the bounty? Certainly not. It is a mere power to control and arrest abuses and enforce a due performance of the statutes of the charity. * * * * But it is said that the boards of trustees and overseers have assented to the act and have adopted it, and it has therefore become binding on the college. I think that the argument is not correct. That approval cannot give effect to an unconstitutional act. *The Legislature and the boards are not the only parties in interest upon such constitutional questions.* The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers, and no private arrangements between such parties can supercede them."

We may also cite, in this connection, the provision contained in the fifth section of the original charter, as follows: "And the constitution of the said college herein and hereby declared and established, shall be and remain the inviolable constitution of the said college forever, and the same shall not be altered or alterable by any ordinance or law of the said trustees." By this provision, it is plain, the trustees were absolutely disabled from assisting in the destruction of the subject of their trust.

Thirdly and lastly: It is contended that, even if the proposed changes in name, character, and location of the college, are regardless of the contract rights of the plaintiffs, and even if the consent of the board of trustees to the Act of 1865 cannot validate it, yet that that Act of Assembly can be sustained as a valid exercise by the Legislature of the powers reserved in the fifth section of

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the original charter of 1802. The language of that reservation is as follows: "And the constitution of the said college hereby declared and established, shall be and remain the inviolable constitution of the said college forever, and the same shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an Act of the Legislature of this Commonwealth."

To this proposition our answer is two-fold. We claim, first, that the provision cited does not, when properly construed, confer upon or reserve to the Legislature the power to revoke and resume the franchises granted by the Act of 1802, and to confer them and the property acquired under them upon a new and different corporation; and, second, that even if the reserved power be construed as authorizing the Legislature to overturn Jefferson College and to bestow its property upon another institution, so far as the State and Jefferson College are concerned, yet that that power cannot be constitutionally exercised so as to affect subsisting contracts held by third parties.

That a power to *alter* the constitution or the college is not a power to *revoke* and *destroy* it, would seem too plain for argument. A right to alter is plainly consistent with the perpetual existence of the college. Such a provision would appear to be intended to meet those altered conditions of society and of pursuits whereby a strict adherence to all the formal requirements of a foundation might defeat its object. But by the construction put upon this provision by the defendants, violence is done both to its letter and spirit.

That a reserved power to alter and amend does not sustain the exercise by the Legislature of a power to revoke and destroy a charter, was expressly ruled in the case of *Allen vs. McKeen*, 1 Sumner, 300, and in the case of *Sage vs. Milliard*, 15 Ben. Monroe, 340.

Nor can it be successfully maintained that, because the Supreme Court of Pennsylvania has held that the reservation in the present case does confer power to dissolve and destroy the corporation, the Federal Court is thereby concluded from looking at the reservation and overruling the decision of the Court below if they deem it erroneous. The contrary has been expressly ruled in the case of *Butz vs. City of Muscatine*, 8th Wallace, 575. "Where," says the Court in that case, "a question involved in the construction of State statutes practically affects those remedies of creditors which are protected by the Constitution, this Court will exercise its own judgment on the meaning of the statutes, irrespectively of the decisions of the State courts, and if it deems those decisions wrong, it will not follow them; and this whether the case goes from the Circuit Court in ordinary course, or from the Supreme Court of the State under the 25th section of the Judiciary Act."

But, conceding for argument's sake, that the reserved power to alter is equivalent to a power to revoke, that a power to modify is the same thing with a power to terminate and destroy, yet, we contend that while then the exercise of such a reserved power might be valid, as between the College and the State, it would be invalid and unconstitutional so far as third parties holding contracts thereby affected would be concerned. We think this proposition can be sustained both upon principle and authority. It is apparent, upon the face of the contracts held by the plaintiffs, that they did not contemplate the contingency of a legislative subversion of their obligation. The argument urged, that the holders were bound to know that the Legislature might exercise its reserved power, is a begging of the question. It is true, they were bound to know the reserved power of the Legislature; but they also had knowledge of the limits of legislative power, and the restraints imposed by the Consti-

tution of the United States for the guaranty and protection of contracts, and that the obligation of contracts were sacred and beyond the reach of legislative action. If the Legislature of a State were to provide by general law that all contracts thereafter made between citizens of the State should be subject to and within the legislative power, and might be impaired or abrogated by future laws, the Constitution of the United States would nevertheless protect contracts made during the existence of such a law against the effect of any law undertaking, in the exercise of such reserved power, to impair their obligations. To hold otherwise, would be to declare that the States might, by law, appropriate to themselves, one by one, powers expressly forbidden them by the Constitution of the United States, and that such reservation would be obligatory upon their citizens, because incorporated into their contracts as part of the law of the land. But if such an attempt on the part of a State to confer upon itself powers forbidden by the paramount law, would be futile in the case of individual, how can such an attempt, even if valid as against a corporation as a mere creation of the Legislature, be successful to impair contracts with the corporation held by third parties?

What is the voice of the authorities? In the case of *Oldtown and Lincoln R. R. Co. vs. Beazie*, 39 Maine, 381, the charter required that not less than 11,000 shares should be subscribed before the subscription could be enforced by calls. The defendant subscribed for 1,000 shares. Only 9,500 shares were subscribed in all. A supplemental act was then passed, reducing the limits to 8,000 shares. It was held that the reserved power to amend the charter did not authorize a change in the liability of the stockholders as between themselves. Shepley, J, says: "It is the charter only, and the rights and liabilities of the corporators as such in consequence thereof, that can be varied by an act of the Legislature,

not the private contracts between the corporation, as one party, and the corporators as the other."

In the case of the *Commonwealth vs. The Essex Company*, 13 Gray, 239, the Supreme Court of Massachusetts ruled that "when under power in a charter rights have been acquired and become vested, no amendment of the charter can take away the property or rights which have become vested under the legitimate exercise of the power granted."

To the same effect is the case of *Durfee vs. Old Colony R. R.*, 3 Allen, 230.

The power of the Legislature under the reserved right to alter is without limit in the direction of changes affecting the general purpose for which the corporation was created, as by extending, restricting, or modifying and regulating the exercise of the general powers combined. But the Legislature goes beyond the limits of the power thus reserved when it undertakes to abrogate contracts made by authority conferred by the charter, or to deprive the corporation of any property or rights of property lawfully acquired.

If it should be objected that these plaintiffs cannot, as mere holders of contracts of the College, file a bill, we refer to *Dodge vs. Woolsey*, 18 Howard, 331, wherein it was held that, when the directors of a bank, instead of resisting, by proper legal proceedings, the enforcement of an unconstitutional Act of Assembly, were passively submitting to it, a stockholder might file a bill and invoke the protection of the Constitution of the United States. And this case may likewise be cited, under a previous division of the argument, to show that mere directors or trustees, whose duty it is to preserve the corporate franchises and property, cannot, by assenting to an Act of the Legislature confiscating both, conclude those beneficially interested.

RECAPITULATION.

1. The complainants are holders of valid contracts of scholarship issu d by the Trustees of Jefferson College, at Canonsburgh, in the county of Washington, in the Commonwealth of Pennsylvania.

2. The Acts of Assembly, of the State of Pennsylvania, dated respectively March 4th, 1865, and February 25th, 1869, providing for a change of name, location, and management of the College, impair the obligation of said contracts.

3. The alleged acceptance, by the Board of Trustees, of the said Acts of Assembly is not efficacious to preclude or estop the complainants from complaining of the infringements of their contracts, and from invoking the protection of the Constitution of the United States.

4. The power to alter, reserved to the Legislature of Pennsylvania, in the 5th section of the Act incorporating Jefferson College, does not warrant the exercise of the power of subverting the College, and bestowing its franchise and property upon another corporation.

5. Even if the power to alter be construed as authorizing the Legislature to revoke and resume the franchises of the College, without allegation of their abuse, yet such power cannot be validly exercised to the detriment of third parties holding contracts of the College.

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